



**COURT OF APPEALS OF INDIANA
ORAL ARGUMENT AT A GLANCE
DEPAUW UNIVERSITY
WALDEN INN AND CONFERENCE CENTER**



George Scott v. Retz and Indiana University

Appeal from:
Marion County Superior Court,
The Honorable
Thomas J. Carroll, Judge

Oral Argument:
Tuesday, October 13, 2009
10:00 a.m.
20 minutes each side

CIVIL LAW ISSUE

George Scott, a Clarian Health Partners Safety and Security investigator, was stuck by an uncapped used syringe while investigating missing narcotics at Indiana University Hospital. He sued Malissa Retz, R.N., for negligence and Indiana University ("IU"), Retz's employer, for respondeat superior and negligent retention and supervision. Are Retz and IU entitled to summary judgment on Scott's claims?

Along with granting summary judgment to Retz and IU, the trial court granted Scott's motion to strike part of an affidavit that IU designated in support of summary judgment. Did this affidavit contain an inadmissible hearsay statement?

CASE SYNOPSIS

Facts and Procedural History

In May 2007, Retz was employed by IU as a nurse in the research department of IU's School of Medicine. For four to six weeks prior to May 31, 2007, Retz had been injecting herself with Demerol improperly accessed through her position at IU. On May 30, 2007, Bernard Harris, a Safety and Security investigator for Clarian Health Partners, Inc. ("Clarian"), began to investigate whether Retz was improperly diverting narcotics from Indiana University Hospital ("the Hospital"), which is operated by Clarian. Harris met with Retz's supervisor, nurse Sherry Wilson. Wilson told Retz about the investigation. Wilson and nurse Laurie Trevino attempted to escort Retz for

drug testing, but Retz left without authorization and could not be located later that day.

On May 31, 2007, Retz showed up for work. She stole morphine from an Accu-Dose room at the Hospital, injected herself with the morphine, and disposed of the used needles, syringes, and empty vials in the trash container of a women's restroom at the Hospital. Following this apparent suicide attempt, Retz confessed it to Trevino and Wilson. Wilson immediately escorted Retz to the Hospital's emergency department. Retz told Wilson and others that the used needles, syringes, and empty vials were still in the women's restroom trashcan.

The used, uncapped needles ended

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up in a brown paper bag that was delivered to the Hospital's emergency department and given to the physician attending Retz. According to Wilson's affidavit, "[t]hat emergency room physician, whose name I believe was Dr. Rutherford, looked in the bag and stated, as best I can remember, 'Attention everyone! There are sharps in the bag.'" The bag was labeled with the following information: "Retz, Malissa E," "05/31/07," "Rutherford, William F," and "Emergency." Nurse Colleen Higginson, a Clarian employee, contacted Clarian Safety and Security and delivered the bag to Harris. Harris, following the instructions of Clarian Safety and Security Lieutenant Tim Looper, had the bag transported to the Safety and Security dispatch center. The brown paper bag was never placed in a sharps container, and the needles inside it were never capped or placed in a sharps container. All Clarian employees, including security employees, had been trained in the proper handling of used needles, including packaging them in labeled sharps containers.

Prior to May 31, 2007, Scott had been informed of a narcotics investigation relating to an IU nurse and assigned to work on it. On June 1, 2007, Scott was telephoned and told a package relating to the narcotics investigation was available for him to pick up. Scott arrived at the dispatch center and saw the brown paper bag with an incident report attached. Scott picked the bag up to read the report, and he was stuck by a needle inside the bag. Upon opening the bag, Scott found four or five uncapped needles.

On January 30, 2008, Scott filed his complaint for damages against Retz and IU. Retz and IU filed separate motions for summary judgment. In support of its motion for summary judgment, IU designated the affidavit of Wilson stating, "[t]hat emergency room physician, whose name I believe was

Dr. Rutherford, looked in the bag and stated, as best I can remember, 'Attention everyone! There are sharps in the bag.'"

On December 1, 2008, the trial court held a hearing on Retz's motion for summary judgment, at which IU's motion for summary judgment was also discussed. On December 18, 2008, Scott filed a motion to strike the above-quoted statement contained in the Wilson affidavit. On January 29, 2009, the trial court issued separate orders granting Scott's motion to strike but also granting summary judgment to Retz and IU. This appeal followed.

Parties' Arguments

I. Motion to Strike

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is generally not admissible evidence, subject to exceptions not alleged to apply in this case. At issue is Wilson's averment, "[t]hat emergency room physician, whose name I believe was Dr. Rutherford, looked in the bag and stated, as best I can remember, 'Attention everyone! There are sharps in the bag.'" The trial court granted Scott's motion to strike on the basis the averment was hearsay, and IU appeals that ruling.

First, IU argues the portion of Wilson's averment declaring Wilson saw Dr. Rutherford look in the bag is undisputedly not hearsay because it is not an out-of-court statement, but simply a declaration of what Wilson saw. Second, IU argues Dr. Rutherford's exclamation is not hearsay because it is not offered to prove there were sharps in the bag, but rather that Clarian employees were on notice for the possible presence of sharps and the need to take precautions. IU argues the entire declaration is relevant evidence of whether Clarian employees acted negligently in failing to cap the needles or

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place them in a sharps container prior to delivering them to Scott.

Scott replies that the trial court properly struck Dr. Rutherford's exclamation even if it is relevant to prove notice. Scott argues the exclamation is inadmissible hearsay because offering a statement for notice of the truth of the matter asserted is practically indistinguishable from offering it for its truth, and deciding otherwise would allow IU to sidestep the hearsay rule.

II. Summary Judgment

Summary judgment is appropriate only if there are no genuinely disputed issues of material fact and the party moving for summary judgment is entitled to judgment as a matter of law. The trial court granted summary judgment to Retz and IU as to all of Scott's claims, and Scott appeals that ruling. To be entitled to summary judgment, Retz and IU are required to show that the undisputed facts negate at least one element of all of Scott's claims. All of Scott's claims include at least two elements: that Retz or IU breached a duty of reasonable care owed to Scott, and that Retz's or IU's breach was the proximate cause of the needle stick.

Scott argues Retz owed him a duty of reasonable care and breached that duty by improperly disposing of uncapped needles in circumstances where she had reason to know a Clarian investigator such as Scott might handle the needles and be stuck by them. According to Scott, IU is vicariously liable for the actions of Retz, its employee, and IU is also liable for negligently retaining and supervising Retz.

Scott argues the trial court erred in granting summary judgment to Retz and IU because genuine issues of material fact exist as to whether Retz's negligence was the proximate cause of the needle stick.

Specifically, Scott claims issues of fact exist as to whether Retz placed the uncapped needles in the paper bag and delivered them to the ER, and whether Clarian emergency room and security employees were unaware that the needles were uncapped when delivering them to Scott.

Retz argues she owed Scott no duty because Retz and Scott had different employers, Scott's injury was not foreseeable, and Retz was not in the best position to prevent Scott's injury. Retz also argues the undisputed facts establish Retz's actions were not the proximate cause of the needle stick. Specifically, Retz claims the admissible evidence establishes that someone other than Retz placed the uncapped needles in the paper bag and delivered the bag to the emergency room, and that Clarian emergency room and security employees knew or believed the paper bag contained uncapped needles and failed to take proper precautions. Retz argues this negligence by the Clarian employees is an unforeseeable intervening cause of the needle stick, such that Retz's actions did not proximately cause it.

IU argues, similar to Retz, that negligence by Clarian emergency room and security employees was an intervening cause such that Retz's conduct did not proximately cause the needle stick. Because Retz was properly granted summary judgment, IU argues it was necessarily entitled to summary judgment on Scott's respondeat superior claim, and that the Clarian employees' intervening negligence also precludes liability on Scott's claims of negligent hiring and supervision. IU further argues it is not subject to respondeat superior liability because Retz's action of injecting herself with narcotics was outside the scope of her employment.

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Glossary

Negligence is the failure to exercise due care such as a reasonably prudent person would have exercised in the situation. To prevail on a claim for negligence, the plaintiff must establish: (1) a duty owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) that the defendant's breach was a **proximate cause** of injury to the plaintiff.

Proximate cause is a cause closely enough connected to the resulting harm to be a sufficient basis for liability.

Respondent superior is the legal principle that an employer is liable for the torts of an employee committed within the scope of employment.

Summary judgment is the court's entry of judgment without a trial because there is no genuine issue of material fact to be decided by a fact-finder and one party is entitled to judgment as a matter of law.

Motion to strike is a motion for the trial court to exclude from the record, and give no consideration to, evidence that one of the parties argues is inadmissible.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay statements are generally inadmissible.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County), Presiding • Judge of the Court of Appeals since January 1998

L. Mark Bailey was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained by election in 2000. Born in Decatur County, Judge Bailey was raised on the family farm homesteaded by his ancestors over 150 years ago. He earned his B.A. from the University of Indianapolis; his J.D. from Indiana University School of Law at Indianapolis; and his M.B.A. from Indiana Wesleyan University.

Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution Committee. Additionally, he served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center. He is also a certified civil mediator.

Judge Bailey was also the first Chairperson of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. In 2004, Judge Bailey and his

First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. In February of 2006, he served as the Distinguished Jurist in Residence at Stetson University College of Law, and in 2007-08, he was the Moderator of the Indianapolis Bar Association's Bar Leader Series. Currently, Judge Bailey is a member of the Supreme Court Committee on Rules of Practice and Procedure and the Judicial Education Committee of the Judicial Conference of Indiana; he again serves on the Board of Managers of the Indiana Judges Association, now as the Appellate District member.

A strong supporter of law-related education, Judge Bailey teaches government classes at the University of Indianapolis. He is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach National Institute of Trial Advocacy programs. He and his wife have two children.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court she was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe

County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges.

Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was retained on the Court of Appeals by election in 2000, lives in West Lafayette with her husband, a Professor of Communication at Purdue (M.A. and Ph.D., Indiana University). Their son, Douglas, a graduate of the U.S.N.A., recently returned from his second deployment.

TODAY'S PANEL OF JUDGES

Hon. Terry A. Crone (St. Joseph County)

- Judge of the Court of Appeals since March 2004

Terry A. Crone was appointed to the Court of Appeals March 8, 2004, representing the Third District. Judge Crone was raised in South Bend, and graduated from DePauw University, cum laude in 1974 and from the University of Notre Dame Law School in 1977.

Judge Crone practiced law in South Bend for nine years concentrating in areas of civil practice and served as the St. Joseph County Attorney from 1981 to 1986. In 1986, Judge Crone was appointed Magistrate of the St. Joseph Circuit Court where he served until his appointment as Judge of the St. Joseph Circuit Court in 1989.

Judge Crone is a past President of the St. Joseph Bar Association, a former Member of the Board of Managers of the Indiana Judge's Association, a Member of the Supreme Court Committee on Character and

Fitness and the Alternative Dispute Resolution Committee of the Indiana Judicial Conference. Judge Crone is currently a member of the St. Joseph County, Indianapolis, Marion County, Indiana State and American Bar Associations. Judge Crone currently serves as Chairman of the Indianapolis Bar Association Bar Leader Series. He helped found a program in South Bend to expose minority high school to the law and related fields; was a founding member of the South Bend Commission on the Status of African-American Males and the St. Joseph County Coalition Against Drugs.

Judge Crone is married and has three daughters.

“Appeals on Wheels”

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

The Court of Appeals has held over 250 "on the road" cases since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

ATTORNEYS FOR THE PARTIES



For Appellant, George Scott:

Robert E. Feagley II

Bob Feagley grew up in Evansville, Indiana. In 1998, he attended Harlaxton College in Grantham, England with a focus on British Studies. He obtained his B.S. in Political Science from the University of Southern Indiana in 2001. In 2004 he graduated from Valparaiso University School of Law and was admitted to the Indiana Bar. During law school, Bob participated in Valparaiso's civil legal aid clinic and clerked for Lee, Cossell, Kuehn & Love, LLP.

Bob has practiced as a member of Lee, Cossell, Kuehn & Love, LLP's litigation team since graduation. Bob has represented hundreds of plaintiffs in numerous counties throughout Indiana as well as multiple other states in personal injury, products liability, premises liability, intentional torts, subrogation, collections, and small business matters. In addition to his work at the firm, Bob serves as an arbitrator for the BBB auto line and dispute resolution programs.

For Appellee, Malissa Retz:

Matthew W. Connor

Matthew Wade Conner is a partner in the Indianapolis firm of Tabbert Hahn Earnest & Weddle, LLP. Mr. Conner graduated from Ball State University in 1990 and Indiana University School of Law – Indianapolis in 1993. Mr. Conner is a former staff attorney for the Indiana Department of Insurance, where he provided counsel to the Department in a wide variety of regulatory matters. Mr. Conner is a member of the Defense Trial Counsel of Indiana, and he concentrates his

practice in the defense of health care providers in several areas of medical malpractice and general litigation, including suits involving wrongful death, class actions and complex litigation. Mr. Conner's practice includes a specific focus on appellate law. He has represented clients before the Indiana Court of Appeals and Supreme Court in more than two dozen cases. This is his third oral argument before the Indiana Court of Appeals.

For Appellee, Indiana University:

David J. Mallon, Jr.

David Mallon's primary practice concentration is in litigation and risk management for health care providers and colleges and universities. He also represents clients in insurance disputes and represents a captive insurance company. He is a senior member of the diet drug product liability team and asbestos product liability team.

Mr. Mallon is a frequent speaker on topics covering health law and medical malpractice. He is a member of the National Health Lawyers Association,

the Defense Trial Counsel of Indiana and the Indianapolis and Indiana Bar Associations.

Mr. Mallon was born in Newark, New Jersey and graduated from Cornell University with an A.B. in 1968. He holds a juris doctorate from Indiana University School of Law, Bloomington, where he graduated in 1975.

Mr. Mallon joined Ice Miller LLP in 1975 after graduating from law school. He is admitted to practice law in the State of Indiana.